



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Freitas-Lancaster, Inc.

File: B-230569.2

Date: June 7, 1988

DIGEST

Where letter of credit submitted as bid guarantee contains conditional language which at best makes it unclear whether the letter is an irrevocable commitment, the letter is materially defective and the bid properly is rejected as nonresponsive.

DECISION

Freitas-Lancaster, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DACA05-88-B-0012, issued by the Corps of Engineers for construction of a structural repair and maintenance facility at Hill Air Force Base, Utah. The Corps rejected the protester's bid based on its determination that Freitas' bid guarantee, in the form of a letter of credit, was materially defective and that the firm issuing the letter of credit was an unacceptable surety. We deny the protest.

The IFB required each bidder to submit a bid guarantee in the amount of 20 percent of its bid or \$3 million, whichever was less. The IFB also incorporated the standard clause at Federal Acquisition Regulation (FAR) § 52.228-1, which requires bid guarantees to be in the form of a "firm commitment," such as an irrevocable letter of credit, and states that a bidder's failure to furnish a bid guarantee in the proper form and amount by bid opening may be cause for rejection of the bid.

As its bid guarantee, Freitas submitted a letter of credit in the required amount issued by Security Trust Company. The Corps subsequently advised Freitas that the contracting officer had found the letter of credit submitted by Freitas to be materially defective because it was not an irrevocable commitment. The contracting officer relied on conditional language in the letter of credit stating that it was "IRREVOCABLE, when accepted." (Emphasis added.) In addition, a signature line appearing at the bottom of the

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letter of credit under the heading "acceptance by" was blank. The contracting officer also found that the firm issuing the letter lacked the financial capacity to stand behind the letter and had failed to show that it currently was in good standing with the Texas Banking Department, the state in which the firm operates.

Freitas first argues that, contrary to the Corps' position, its letter of credit constituted an irrevocable commitment by the issuer. According to Freitas, the language in the letter on which the Corps relies--"irrevocable, when accepted"--refers to acceptance by either Freitas or the Corps. With regard to acceptance of the letter by itself, Freitas argues that it effectively indicated its acceptance by submitting the letter with its bid; according to Freitas, its failure to sign the acceptance line on the letter is waivable as a minor informality. With regard to acceptance by the Corps, Freitas initially argued that acceptance within the meaning of the letter would occur when the Corps accepted Freitas' bid through award of a contract. In a subsequent submission, however, Freitas revised its position, arguing that to the extent the letter required acceptance by the Corps, such acceptance occurred when the Corps received Freitas' bid and the letter of credit.

A bid guarantee, including a properly drawn irrevocable letter of credit, is a firm commitment intended to assure the government that a successful bidder will execute a written contract and furnish the payment and performance bonds required under the contract. Its purpose is to secure the surety's liability to the government for excess costs in the event the bidder fails to carry out these obligations. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. When the liability of the surety is not clear, the guarantee properly may be regarded as defective and the bid rejected as nonresponsive. J.C. & N. Maintenance, Inc., B-229556, Dec. 8, 1987, 87-2 CPD ¶ 567.

A letter of credit is essentially a third-party beneficiary contract whereby a party desiring to transact business induces another, usually a bank, to issue a letter to a third party promising to honor that party's drafts or other demands for payment. Alan L. Crouch, B-207653, Oct. 19, 1982, 82-2 CPD ¶ 345. When a letter of credit contains language which creates an uncertainty as to whether the letter would be enforceable against the issuer, the letter is unacceptable as a "firm commitment" within the meaning of

the standard FAR bid guarantee clause. BKS Construction Co., B-226346, et al., May 28, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 558. In this case, we find that it is at best unclear whether the letter of credit submitted by Freitas is irrevocable and, as a result, the letter does not constitute the firm commitment required by the FAR clause.

As discussed above, the letter of credit states that it is "irrevocable, when accepted," and includes a signature line, left blank on Freitas' letter, under the heading "accepted by." On its face, the letter thus clearly contemplates satisfaction of a condition--"acceptance" by an unspecified party--before it will become irrevocable. According to Freitas, the language in the letter can reasonably be interpreted to refer to acceptance by Freitas, which in effect has indicated its acceptance of the letter by submitting it with its bid, or by the Corps, which would satisfy the condition by "accepting" Freitas' bid.^{1/} In our view, however, it is at least as reasonable to interpret the language in the letter to refer to acceptance by the issuer, the party incurring the obligation under the letter. In this regard, the fact that the bid contains the signature of an officer of the issuing firm is not sufficient to indicate acceptance, in view of the separate acceptance signature line, which is blank on the letter submitted by Freitas.

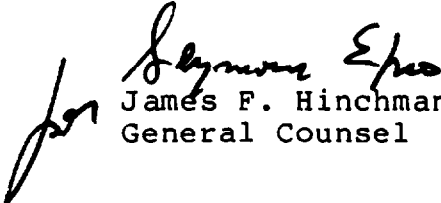
By its own terms, the letter of credit submitted by Freitas was not irrevocable until accepted, such acceptance to be shown by the signature of the accepting party. Since the letter reasonably could be interpreted to require acceptance by the firm issuing the letter, and Freitas' letter lacks the issuer's signature on the "acceptance by" line, it is at best unclear whether the letter was irrevocable at bid opening. Accordingly, the letter of credit was materially defective and the bid was properly rejected as nonresponsive. See BKS Construction Co., B-226346, et al., supra.

In view of our finding that the Corps properly rejected Freitas' bid based on the defect in the letter of credit, we need not address the second basis relied on by the Corps for rejecting the bid, the unacceptability of the firm issuing the letter of credit. In addition, since we find the protest to be without merit, we deny Freitas' request to

^{1/} As discussed above, Freitas initially argued that acceptance by the Corps would occur upon award of a contract to Freitas. Under this interpretation, it appears the letter would remain revocable until contract award. Subsequently, Freitas revised its position, arguing that acceptance by the Corps occurred upon receipt of Freitas' bid and letter of credit.

recover its bid preparation costs and the costs of filing and pursuing the protest. See Bid Protest Regulations, 4 C.F.R. § 21.6 (1988).

The protest is denied.

 James F. Hinchman
General Counsel